COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 8, 2001

APPLICATION OF

VIRGINIA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION PROGRAM

CASE NO. INS010048

For approval of amended plan of
operation pursuant to Virginia
Code § 38.2-5017

ORDER APPROVING AMENDED PLAN OF OPERATION

ON A FORMER DAY came the Virginia Birth-Related Neurological Injury Compensation Program, by its administrator, and pursuant to § 38.2-5017 of the Virginia Code, filed with the Clerk of the Commission an amended plan of operation. The original plan of operation was approved by the Commission by order dated November 27, 1987, in Case No. INS870294.

THE COMMISSION, having considered the amended plan of operation, the recommendation of the Bureau of Insurance, and the law applicable in this matter, is of the opinion that the amended plan of operation, which is attached hereto and made a part hereof, should be approved.

THEREFORE, IT IS ORDERED that the Virginia Birth-Related Neurological Injury Compensation Program's amended plan of operation be, and it is hereby, APPROVED.

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I. NAME

This program shall be known as the Virginia Birth-Related Neurological Injury Compensation Program established pursuant to Chapter 50 of Title 38.2, Va. Code Ann. §§ 38.2-5000 through 38.2-5021 (Michie Repl. Vol. 1994 & Supp. 1995).

II. DEFINITIONS

A. As used in this plan of operation, the following terms shall have the meanings in § 38.2-5001.

1. *"Birth-related neurological injury"* means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of the Virginia Birth-Related Neurological Injury Compensation Act, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

2. *"Claimant"* means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

3. *"Commission"* means the Virginia Workers' Compensation Commission.

4. *"Participating Hospital"* means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the participating hospital assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term also includes employees of such hospitals, excluding, physicians or nursemidwives who are eligible to qualify as participating physicians, acting in the course of and in the scope of their employment.

5. "Participating Physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the scope of such licensure and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical

care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.25004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term also includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the physician practices.

6. "Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by the Virginia Birth-Related Neurological Injury Compensation Act.

B. As used in this plan of operation:

1. "Act" means the Virginia Birth-Related Neurological Injury Compensation Act.

2. _"Assessment year" means the period from January 1 until December 31 of each year.

3. _"Board" means the board of directors of the Program, as provided in Article IV of this plan.

4. "Director(s)" means members) of the board.

5. "Fund" means the Virginia Birth-Related Neurological Injury Compensation Fund, as provided in § 38.2-5015 and Article IX of this plan.

6. "Fund Manager" means the person or entity appointed by the board pursuant to Article IX of this plan.

7. "Plan" means this plan of operation, as adopted by the board and approved by the State Corporation Commission.

8. "SCC" means the State Corporation Commission.

9. *"Servicing Company"* means an entity appointed by the board pursuant to Article X of this plan to administer the processing and payment of claims against the Fund and to provide such other services related to the administration of the Program as deemed necessary or desirable by the board. The Program may, in lieu of appointing a servicing company, administer the processing and payment of claims against the Fund.

III. PURPOSE

It is the purpose of the Program to implement the Act, thereby seeking to assure the lifetime care of infants with birth-related neurological injuries, fostering an environment that will increase the availability of medical malpractice insurance at a reasonable cost for physicians and hospitals providing obstetrical services, and promoting the availability of obstetrical care to indigent and low-income patients.

IV. BOARD OF DIRECTORS ("BOARD")

A. Governance

The Program shall be governed by the board, which shall administer the plan.

B. Appointment

Directors shall be appointed by the Governor as provided in § 38.2-5016(C)

C. Term

Directors shall be appointed for a term of three years or until their successors are appointed and qualify for office. Terms are staggered.

D. Regular Meeting

The board shall meet annually for its organizational meeting in September of each year. The board may provide, by resolution, for the time and place of additional regular meetings to be held throughout each year as the board deems necessary. Notice to directors shall not be required for any regular meeting.

E. Special Meetings

Special meetings may be called by the chairman or any two directors. The chairman shall fix the time and place of a special meeting. Notice of a special meeting may be sent by mail, telephone, telegram or fax, provided such notice is dispatched at least 72 hours prior to the special meeting. Any director present at a special meeting shall be deemed to have waived any objection to lack of notice. No statement of purpose shall be required for the calling of a special meeting.

F.Quorum

Four directors shall constitute a quorum for the transaction of any business or the exercise of any power of the Program.

G. Rules of Procedure

The board may promulgate or adopt rules of procedure governing the conduct of its regular and special meetings as it deems necessary.

H. Officers

The board shall elect annually, from among its members at its organizational meeting, a chairman and a vice chairman/secretary to serve one-year terms or until their successors are elected and assume office. The chairman and the vice chairman/secretary shall serve at the pleasure of the board.

Any vacancy in the office of chairman or vice chairman/secretary shall be filled by election for the unexpired portion of the applicable term. The chairman shall preside at all regular and special meetings and discharge such other duties incidental to the office or as the board may require. The vice chairman/secretary shall cause to be issued all notices of regular or special meetings, cause to be

recorded the minutes of such meetings, and discharge such other duties as may be incidental to the office or as the board may require.

I. Voting

Each director shall have one vote. The board shall act by majority vote. Any proposal or motion shall be carried if it receives an affirmative vote of a majority of the directors present at a duly constituted regular or special meeting. No proxy voting shall be permitted.

J. Committees

The board may establish special or standing committees as it deems necessary.

K. Powers

The board shall have the general power to administer and manage the Program and to administer and manage the Fund, which general power shall include, without limitation, the power to:

1. administer the processing and payment of claims against the Fund;

2. appoint a servicing company;

3. appoint a fund manager;

4. provide for the annual assessments of physicians, licensed nurse-midwives and hospitals wishing to participate in the Program, nonparticipating physicians and liability insurers, in accordance with the Act;

5 direct the investment and reinvestment of any surplus in the Fund subject to a prudent person's standard of care over losses and expenses, provided any investment income generated remains in the Fund;

6. retain an investment advisor from a list provided by the chief investment officer of the Virginia Retirement System.

7. insure and reinsure the risks of the Fund, in whole or in part;

8. reduce for a stated period of time the annual participating physician assessment described in subsection A of § 38.2-5020 and the annual participating hospital assessment described in subsection C of § 38.2-5020 after the SCC determines the Fund is actuarially sound in conjunction with actuarial investigations conducted pursuant to § 38.2-5021.

9. establish and maintain physical facilities and contract as necessary for space, equipment and services;

10. provide for the keeping of, and access to, the records of the Program and the Fund;

11. provide for the audit and inspection of the financial books, papers and condition of the Program and the Fund;

12. open and maintain accounts at financial institution(s) and provide for final, administrative and clerical services, as necessary;

13. arrange for the payment of awards made pursuant to the Act and for the payment of the expenses of administration of the Program and the Fund;

14. enforce its contractual and other rights;

15. defend the Fund and protect the Fund and the Program from fraud and deception;

16. purchase, hold, sell or transfer real and personal property and place such property in a trust for the benefit of claimants who have received awards;

17. employ an executive director and other assistants as it deems necessary in the manner permitted by law;

18. appoint and authorize a person to sign bills, notes, acceptances, endorsements, checks, releases, receipts, contracts and other instruments.

19. obtain insurance against liability or damage to property as it deems necessary;

20. accept gifts, awards and donations to the Fund;

21. exercise the authority granted to it by the Act and this plan, as approved.by the SCC.

22. review, consider and act on matters deemed by it to be necessary and proper for the administration of the Program; and

23. exercise such other powers as are necessary for the efficient operation of the Program.

L. Compensation

Directors shall serve without salary or other compensation. Directors shall be reimbursed for actual and necessary expenses incurred in the performance of their official duties as directors.

M. Liability of Directors

The directors shall not be subject to any personal liability concerning the administration of the Program or the payment of any award. The Program shall indemnify the directors against personal liability and any other costs, as a cost of doing business, to the extent permitted by law.

N. Removal

Directors may be removed from office by the Governor, as provided in § 2.1-43 (B).

O. Vacancies

Vacancies on the board shall be filled by the Governor for the unexpired portion of the current term.

V. FACILITIES

A. The offices of the Program initially shall be located in the City of Richmond, Virginia, or at such other place within the Commonwealth as the board may designate.

B. Permanent offices of the Program may be established as deemed necessary by the board.

C. The mailing address of the Program shall be 9100 Arboretum Parkway, Suite 365, Richmond, Virginia 23236.

D. The agent for service of process on the Program shall be the Attorney General of Virginia.

VI. PARTICIPATING PHYSICIANS

A. Certification of Required Agreements

As a condition imposed by law for participation in the Program, a participating physician shall certify to the Program, on a form accompanying the payment of his annual assessment, that he has executed the agreements required by § 38.2-5001, specifically:

1. an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance services and to patients who are indigent and, upon the approval of such a program by the Commissioner of Health, to participate in its implementation; and

2. an agreement with the Board of Medicine to submit to review by the Board of Medicine to determine whether there is reason to believe that the alleged birth-related neurological injury resulted from, or was aggravated by, substandard care on the part of the participating physician.

B. Payment of Assessment

A participating physician shall pay an annual participating physician assessment, as required by Article VIII of this plan.

C. Participation in Development and Implementation of Indigent Care Program

A participating physician shall participate in the development and implementation of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent to the extent provided for in the required agreement with the Commissioner of Health.

D. Submission to Review by Board of Medicine

A participating physician shall submit to review and evaluation by the Board of Medicine, as required by the agreement executed with the Board of Medicine, to determine whether there is reason to believe that a birth-related neurological injury alleged in a petition resulted from, or was aggravated by, sub-standard care on the part of the participating physician.

E. Binding Effect of Findings of the Commission

All parties are bound for all purposes, including any suit at law against a participating physician or participating hospital, by the finding of the Commission (or any appeal therefrom) with respect to whether an alleged injury is a birth-related neurological injury.

F. Exclusive Remedy

Except as provided in § 38.2-5002 (D) the rights and remedies granted by the Act and this plan to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury.

A civil action arising out of or related to a birth-related neurological injury under the Act, brought by an infant, his personal representative, parents, dependents, or next of kin, shall not be foreclosed against a nonparticipating physician or hospital, provided that (i) no participating physician or hospital shall be made a party to any such action or related action, and (ii) the commencement of any such action, regardless of its outcome, shall constitute an election of remedies, to the exclusion of any claim under this Act; provided that if claim is made, accepted and benefits are provided by the Fund established under this Program, the Fund shall have the right, and be subrogated, to all of the common law rights, based on negligence or malpractice, which the said infant, his personal representative, parents, dependents or next of kin may have or may have had against the nonparticipating physician or hospital, as the case may be.

A civil action, however, shall not be foreclosed against a physician or a hospital where there is clear and convincing evidence that such physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury, provided that such suit is filed prior to, and in lieu of payment of, an award under the Act. Such suit shall be filed before the award of the Commission becomes conclusive and binding as provided for in § 38.2-5011.

G. Participating Physician to Receive Copy of Petition

A participating physician shall receive by mail, from the commission, a copy of any petition that names the participating physician.

H. Cooperation with Medical Evaluation Panel

A participating physician shall cooperate in the medical evaluation of claims filed with the Commission as provided in Article XI of this plan.

I. Licensed Nurse-Midwives

1. A licensed nurse-midwife who performs obstetrical services, either full-time or part-time, may be deemed to be a participating physician in the Program if

a. the nurse-midwife at the time of the injury

(1) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the nurse-midwife agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical

AssistanceServices and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation;

(2) had in force an agreement with the Board of Medicine whereby the nurse-midwife agreed to submit to review by the Board of Medicine as required by § 38.2-5004 (B);

(3) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred;

(4) was licensed as a nurse-midwife; and

(5) was working under the supervision of a participating physician in a hospital.

b. an application is filed on behalf of the nurse-midwife(-ves), as required by Section I (2) of this article.

VII. PARTICIPATING HOSPITALS

A. Certification of Execution of Required Agreements

As a condition imposed by law for participation in the Program, a duly authorized representative of a participating hospital shall certify to the Program, on a form accompanying the payment of its annual assessment, that the agreements required by § 38.2-5001 have been executed on behalf of the participating hospital, specifically:

1. an agreement with the Commissioner of Health or his designee, in a form prescribed by the commissioner, to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent and, upon the approval of such program by the Commissioner of Health, to participate in its implementation; and

2. an agreement with the Department of Health to submit to review of its obstetrical service to determine whether there is reason to believe that the alleged birth-related neurological injury resulted from, or was aggravated by, substandard care on the part of the participating hospital at which the birth occurred.

B. Payment of Assessment

A participating hospital shall pay an annual participating hospital assessment, as required by Article VIII of this plan. A participating hospital with a residency training program accredited by the American Council for Graduate Medical Education may pay an annual participating physician assessment to the Program for residency positions in the hospital's residency training program, as authorized by Article VIII of this plan.

C. Participation in Development and Implementation of Indigent Care Program

A participating hospital shall participate in the development and implementation of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent to the extent provided for in the required agreement with the Commissioner of Health.

D. Submission to Review by Department of Health

A participating hospital shall submit to the review and evaluation by the Department of Health as required by the agreement executed with the Department of Health to determine whether there is reason to believe that a birth-related neurological injury alleged in a petition resulted from, or was aggravated by, substandard care on the part of the participating hospital at which the birth occurred.

E. Binding Effect of Findings of the Commission

All parties are bound for all purposes, including any suit at law against a participating physician or participating hospital, by the finding of the Commission (or any appeal therefrom) with respect to whether an alleged injury is a birth-related neurological injury.

F. Exclusive Remedy

The rights and remedies granted by the Act and this plan to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise, arising out of, or related to, a medical malpractice claim with respect to such injury.

G. Participating Hospital to Receive Copy of Petition

A participating hospital shall receive by mail, from the Commission, a copy of any petition that names the participating hospital.

H. Cooperation with Medical Evaluation Panel

A participating hospital shall cooperate in the medical evaluation of claims filed with the Commission as provided in Article XI of this plan.

VIII. ASSESSMENTS

A. Method of Payment

1. Method

Assessments shall be paid according to the procedure established by the fund manager and approved by the board.

2. Effective Date of Assessment

An assessment shall be deemed to have been paid on the date full payment of the assessment is received by the fund manager.

3. Assessment Year

The assessment year shall be from January 1 until December 31 of each year.

B. Participating Physicians

1. Annual Participating Physician Assessment

a. Physicians. A physician who otherwise qualifies as a participating physician pursuant to the Act may become a participating physician in the Program for a particular assessment year by paying an annual participating physician assessment to the Program in the amount of $5,000 on or before December 1 of the previous year. See also Section C(2) of this Article.

b. Prorated Participating Physician Assessment. A physician may become a participating physician during the assessment year provided the physician gives written notice to the Program at least thirty days prior to the requested date for participation and pays to the Program a prorated participating assessment for the remaining portion of the year.

c. A participating physician who has paid an annual assessment for a particular assessment year to the Program and who retires from the practice of medicine during that particular assessment year shall be entitled to a refund half of his or her annual assessment for the of one assessment year if he or she retires on or before July 1 of that year.

d. Licensed Nurse-Midwives. A licensed nurse-midwife(-yes) who otherwise qualifies as a participating Physician pursuant to Article VIII) of this plan may be deemed to be a participating physician in the Program for a particular assessment year by paying an annual participating physician assessment to the Program in the amount of $5,000 on or before December 1 of the previous year.

C. Participating Hospitals

1. Annual Participating Hospital Assessment

A hospital that otherwise qualifies as a participating hospital pursuant to the Act may become a participating hospital in the Program for a particular year by paying an annual participating hospital assessment to the Program, on or before December 1 of the previous year, amounting to $50 per live birth for the prior year, as reported to the Department of Health in the Annual Survey of Hospitals. The participating hospital assessment shall not exceed $150,000 for any participating hospital in any twelve-month period.

2. Annual Participating Physician Assessment for Residency Training Programs

A participating hospital with a residency training program accredited to the American Council for Graduate Medical Education may pay an annual participating physician assessment to the Program for residency positions in the hospital's residency training program. However, any resident in a duly accredited family practice or obstetrics residency training program at a participating hospital shall be considered a participating physician in the Program and neither the resident nor the hospital shall be required to pay an assessment for such participation. No resident shall become a participating physician in the Program, however, until thirty days following notification by the hospital to the Program of the name of the resident or residents filling the particular position for which the annual participating physician assessment payment, if required, has been made.

3. Prorated Participating Hospital Assessment.

A hospital may become a participating hospital during the assessment year, provided the hospital gives written notice to the Program at least thirty days prior to the requested date for participation and pays to the Program a prorated participating assessment for the remaining portion of the year.

D. Nonparticipating Physicians

1. Annual Assessments

All licensed physicians practicing in the Commonwealth on September 30 of a particular year, other than participating physicians, shall pay to the Program an annual assessment of $250 for the following assessment year unless the State Corporation Commission has determined that the Fund is actuarially sound and entered an order suspending the assessment pursuant to § 38.2-5020 (G).

2. Notice of Obligation

Nonparticipating physicians shall be notified of their annual assessment obligation by the fund manager or the Program.

3. Nonparticipating Physicians Exempted from Assessment Obligation

Upon proper certification to the Program, the following physicians shall be exempt from the payment of the annual $250 assessment:

a. A physician who is employed by the Commonwealth or federal government and whose income from professional fees is less than an amount equal to ten percent of the annual salary of the physician.

b. A physician who is enrolled in a full-time graduate medical education program accredited by the American Council for Graduate Medical Education.

c. A physician who has retired from active clinical practice.

d. A physician whose active clinical practice is limited to the provision of services, voluntarily and without compensation, to any patient of any clinic which is organized in whole or in part for the delivery of health care services without charge as provided in § 54.1-106.

E. Insurance Carriers

1. Insurance Carriers Subject to Assessment Obligation

All insurance carriers licensed to write, and engaged in writing, liability insurance in the Commonwealth in a particular year shall be subject to an annual assessment obligation.

2. Definition of "Liability Insurance"

For the purpose of this section of the plan, the term "Liability Insurance" shall include the classes of insurance defined in §§ 38.2-117 through 38.2-119 and the liability portions of the insurance defined in §§ 38.2-124, 38.2-125 and §§ 38.2-130 through 38.2-132.

3. Amount of Annual Assessment

a. Taking into account the, assessments collected pursuant to § 38.2-5020 (A)-(C), if required to maintain the Fund on an actuarially sound basis, all insurance carriers licensed to write, and engaged in writing, liability insurance in the Commonwealth in a particular year shall pay into the Fund an annual assessment for the following year, in an amount determined by the SCC pursuant to § 38.2-5021 (A).

b. All annual assessments against liability insurance carriers shall be made on the basis of net direct premiums written for the business activity which forms the basis for each entity's inclusion as a funding source for the Program in the Commonwealth during the prior year ending December 31, as reported to the SCC, and shall be in the proportion that the net direct premiums written by each on account of the business activity forming the basis for their inclusion in the Program bears to the aggregate net direct premiums for all such business activity written in this Commonwealth by all such entities. For purposes of the Act and this plan, the phrase "net direct premiums written" means gross direct premiums written in this Commonwealth on all policies of liability insurance less (i) all return premiums on the policy, (ii) dividends paid or credited to policyholders, and (iii) the unused or unabsorbed portions of premium deposits on liability insurance.

c. Insurance carriers subject to the annual assessment obligation under § 38.2-5020 (E) shall not be individually liable for an annual assessment in excess of one quarter of one percent of that insurance carrier's net direct premiums written.

d. Liability insurance carriers shall be entitled to recover their initial and annual assessments through (i) a surcharge on future policies, (ii) a rate increase applicable prospectively, or (iii) a combination of the two, at the discretion of the SCC.

e. Whenever the SCC determines the Fund is actuarially sound in conjunction with actuarial investigations conducted pursuant to § 38.2-5021, it shall enter an order suspending the nonparticipating physician assessment. An annual assessment up to $250 shall be reinstated whenever the SCC determines that such assessment is required to maintain the Fund's actuarial soundness.

4. Credits Against Malpractice Insurance Premiums

a. Each insurer issuing or issuing for delivery in the Commonwealth any personal injury liability policy which provides medical malpractice liability coverage for the obstetrical practice of any participating physician shall provide a credit on such physician's annual medical malpractice liability insurance premium in an amount that will produce premiums that are neither inadequate, excessive nor unfairly discriminatory, as required by § 38.2-1904, and as determined by the SCC.

b. Each insurer issuing or issuing for delivery in the Commonwealth any personal injury liability policy which provides medical malpractice liability coverage for the obstetrical services of any participating hospital shall provide a credit on such hospital's annual medical malpractice liability insurance premium in an amount that will produce premiums that are neither inadequate, excessive nor unfairly discriminatory, as required by § 38.2-1904, and as determined by the SCC.

F. Consequences of Nonpayment of Assessment Obligation

1. Participating Physicians

No physician or licensed nurse-midwife shall be a participating physician unless the assessment currently due has been paid.

2. Participating Hospitals

No hospital shall be deemed to be a participating hospital unless the assessment currently due has been paid.

3. Nonparticipating Physicians

Nonparticipating physicians subject to an assessment obligation shall remain liable for past and current assessments until all are paid.

4. Insurance Carriers

Liability insurance carriers subject to an assessment obligation shall remain liable for past and current assessments until all are paid.

5. Delinquent Assessments-Nonparticipating Physicians and Insurance Carriers

Annual assessments for nonparticipating physicians and liability insurance carriers shall be due on or before December 1 for the following assessment year. The board may adopt procedures to compel the payment of delinquent assessments. Such procedures may include resort to judicial or administrative process or petitioning the appropriate regulatory agency of the Commonwealth to compel the payment of delinquent assessments.

6. Delinquent Assessments-Participating Physicians and Participating Hospitals

Annual assessments shall be due on or before December 1 for the following assessment year.

IX. THE BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION FUND ("FUND")

A. Source

The Fund shall be composed of all initial and annual assessments paid pursuant to the Act, all interest and income earned thereon, and all gifts, awards and donations thereto.

B. Purpose

The Fund shall be available to finance the payment of awards made pursuant to the Act and the payment of expenses associated with the administration of the Program, including the reasonable expenses of the Commission. The assets of the Fund administered by the board of directors of the Program are trust funds and shall be used solely in the interest of the recipients of awards pursuant to §38.2-5009 and to administer the Program.

C. Restricted Account

The Fund shall be deposited in a restricted, interest-bearing checking account or accounts in any financial institution doing business in the Commonwealth or may be invested in interest-bearing time deposits or certificates of deposit in any financial institution doing business in the Commonwealth and whose deposits are federally insured, or treasury bills or notes of the government of the United States, or pursuant to such other investment policies as may be approved by the board.

The board shall determine what portion of the Fund shall be retained in a bank account or accounts and what portion, if any, shall be invested in the forms of investment previously listed.

D. Fund Manager

1. Appointment

The board shall appoint, subject to the provisions of the Virginia Public Procurement Act (§§ 11-35 through 11-80), a fund manager who shall have responsibility for managing the income and expenditures of the Fund.

2. Duties

The duties of the fund manager shall include:

a. establishing and managing the account or accounts into which the assessments shall be deposited;

b. depositing the assessments paid into the Fund account(s);

c. supervising the investment and reinvestment of any surplus in the Fund over losses and expenses;

d. arranging for reinsurance of risks of the Fund, in whole or in part;

e. making disbursements from the Fund as required for payment of awards pursuant to the Act and for payment of expenses for the administration of the Program;

f. presenting to the board a quarterly statement which reports the Fund's transactions, condition, operations and affairs during the prior three-month period; and

g. filing with the Commissioner of Insurance on or before the date(s) specified by the SCC, a statement in such format as may be prescribed by the SCC, which shall report the information deemed necessary for the SCC to undertake the actuarial investigation of the Fund required by § 38.2-5021.

3. Qualifications. Standards. Terms & Compensation

The board shall provide for the establishment of qualifications, standards, terms and compensation applicable to the fund manager.

4. Identity of Fund Manager and Servicing Company

The duties of the fund manager shall not be assigned to, or performed by, the same person or firm appointed as servicing company.

E. Actuarial Investigation of the Fund

1. The Bureau of Insurance of the SCC shall make an initial actuarial valuation of the assets and liabilities of the Fund at the conclusion of the first year of operation. This valuation, along with the results of an additional investigation, shall be considered by the SCC in determining the requirements of the Fund and the amount of any assessment to be paid by the entities listed in § 38.2-5020(E) for the tax year beginning January 1, 1989.

2. In subsequent years, the SCC shall make an actuarial valuation of the Fund no less frequently than biennially. The results of such valuations shall be considered by the SCC in determining subsequent assessments applicable to entities listed in § 38.2-5020(E). No such entity, however, shall be liable for an annual assessment in excess of one quarter of one percent of that entity's net direct premiums written.

3. If the SCC finds that the Fund cannot be maintained on an actuarially sound basis subject to the maximum assessments permitted by statute, the SCC shall promptly notify the Speaker of the House of Delegates, the President of the Virginia Senate, the board of the Program, and the Commission.

X. ADMINISTRATION OF CLAIMS

A. Appointment of Servicing Company

The board may appoint, subject to the provisions of the Virginia Public Procurement Act, a servicing company, which shall administer the processing of claims against the Fund, or the Program may, on its own, administer the processing of claims against the Fund.

B. Duties of Servicing Company

The duties of the servicing company shall include:

1. investigating the facts alleged in each petition and verifying records produced to make recommendations to the board whether a claimant is eligible for an award pursuant to the Act;

2. verifying the amount of expenses claimed in conjunction with each award providing compensation, including whether the items listed in § 38.2-5009 (1) (a) - (d) apply to the amount claimed;

3. directing the fund manager to disburse award payments;

4. providing clerical and administrative services necessary for the processing of claims made against the Fund, and such other clerical and administrative duties as may be directed by the chairman of the board; and

5. presenting to the board an annual report concerning the operation of the claims processing procedure.

C. Qualifications. Standards Terms & Compensation

The board shall provide for the establishment of qualifications, standards, terns and compensation applicable to the servicing company, if a servicing company is appointed.

D. Identity of Fund Manager and Servicing Company

The duties of the servicing company shall not be assigned to, or performed by, the same person or firm appointed as fund manager.

XI. CLAIMS PROCEDURE

A. Filing of Claims

1. For each claim made pursuant to the Act, the claimant shall file with the Commission a petition setting forth the following information:

   a. The name and address of the legal representative and the basis for his or her representation of the injured infant;

   b. The name and address of the injured infant;

   c. The name and address of any physician or licensed nurse-midwife providing obstetrical services who was present at the birth and the name and address of the hospital at which the birth occurred;

   d. A description of the disability for which claim is made;

   e. The time and place where the birth-related neurological injury occurred;

   f. A brief statement of the facts and circumstances surrounding the birth-related neurological injury giving rise to the claim;

   g. All available relevant medical records relating to the person who allegedly suffered a birth-related neurological injury and an identification of any unavailable records known to the claimant and the reason's for their unavailability;

   h. Appropriate statements, evaluations, prognoses and such other records and documents reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the injured infant due to a birth-related neurological injury;

i. Documentation of expenses and services incurred to date, which indicates whether such expenses and services have been for, and if so, by whom; and

j. Documentation of any applicable private or governmental source of services or reimbursement concerning, or resulting from, the birth-related neurological injury.

2. The claimant shall furnish the Commission with a filing fee of fifteen dollars and as many copies of the petition as required for service upon the Program, all physicians, licensed nurse-midwives and hospitals named, the Board of Medicine and the Department of Health.

3. Upon receipt of a petition, the Commission shall immediately serve a copy upon the agent designated in Article V by registered or certified mail, and shall mail copies of the petition to all physicians, licensed nurse-midwives and hospitals named in the petition, the Board of Medicine and the Department of Health.

B. Administrative Evaluations

1. Upon receipt of a petition, the Board of Medicine shall evaluate the claim. If it determines that there is reason to believe that the alleged injury resulted from, or was aggravated by, substandard care on the part of a physician, it shall take appropriate action consistent with the authority granted to it in §§ 54.1-2911 through 54.1-2928.

2. Upon receipt of a petition the Department of Health shall evaluate the claim. If it determines that there is reason to believe that the alleged birth-related neurological injury resulted from, or was aggravated by, substandard care on the part of a hospital, it shall take appropriate action consistent with the authority granted to it under Title 32.1.

C. Response of the Proms

Within thirty days of the date of service of the petition, the Program shall file with the Commission a response which shall present relevant written information relating to whether the injury alleged is a "birth-related neurological injury" as defined in the Act and this plan. The claimant or Program may amend its petition or response at any time prior to the hearing pursuant to § 38.2-5006, and after the filing of the report of the medical evaluation panel in § 38.2-5008(B).

D. Hearing Scheduled

1. Immediately after the petition is received, the Commission shall set a date for a hearing, which shall be no sooner than 45 days and no later than 120 days after the petition is filed.
2. The Commission shall notify the parties, i.e., the claimant and the Program, of the time and place of the hearing.
3. The hearing shall be held in the city or county where the alleged injury occurred, or in a contiguous city or county unless otherwise agreed to by the parties and authorized by the Commission.

E. Prehearing Proceedings

1. Any party to a proceeding may, upon application to the Commission setting forth the materiality of the evidence sought, serve interrogatories and cause the depositions of witnesses to be taken.

2. The costs associated with such discovery may be recovered by a claimant as expenses incurred in connection with the filing of a claim pursuant to § 38.2-5009(4).

3. Depositions shall be taken only after giving notice in the manner prescribed for depositions in actions at law, except that such notice shall be directed to the Commission, Commissioner or Deputy Commissioner before whom the proceeding may be pending.

F. Determination of Claims

1. The hearing shall be conducted pursuant to the Commission's rules of practice and procedure, unless otherwise required by the Act.

2. The Commission shall determine, based on evidence presented to it, the following:

   a. Whether the injuries claimed are birth-related neurological injuries as defined in § 38.2-5001. A rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury where it has been demonstrated, to the satisfaction of the Commission, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that the infant was thereby rendered permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. If either party disagrees with such presumption, that party shall have the burden of proving that the injuries alleged are not birth-related neurological injuries within the meaning of the Act.

   b. Whether obstetrical services were delivered by a participating physician at the birth.

   c. Whether the birth occurred in a participating hospital.

   d. How much compensation, if any, should be awarded pursuant to § 38.2-5008 and this plan.

3. The report of the medical evaluation panel, filed pursuant to § 38.2-5006, shall be considered by the Commission. At the request of the Commission, one member of the panel shall be available to testify at the hearing. The Commission, however, shall not be bound by the panel's recommendations.

4. If the Commission determines (i) that the injury alleged is not a birth-related neurological injury as defined in § 38.2-5001, or (ii) that obstetrical services were not delivered by a participating physician at the birth and that the birth did not occur in a participating hospital, it shall dismiss the petition and cause a copy of its order of dismissal to be sent immediately to the parties by registered or certified mail.

5. Upon determining (i) that an infant has sustained a birth-related neurological injury, and (ii) that obstetrical services were delivered by a participating physician at the birth or that the birth occurred in a participating hospital, the Commission shall make an award providing compensation for the following items concerning the injury:

   a. Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative, residential and custodial care and service, special equipment or facilities, and related travel, such expenses to be paid as they are incurred. However, such expenses shall not include:

(1) Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the federal government except to the extent prohibited by federal law;

(2) Expenses for items or services that the infant has received, or is contractually entitled to receive from any prepaid health plan, health maintenance organization, or other private insuring entity;

(3) Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or federal government except to the extent prohibited by federal law; and

(4) Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or other private insurance program.

b. Expenses of medical and hospital services under paragraph (a), above, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of alike standard of living when such treatment is paid for by the injured person.

c. Loss of earnings from the age of eighteen are to be paid in regular installments beginning on the eighteenth birthday of the infant. An infant found to have sustained a birth-related neurological injury shall be conclusively presumed to have been able to earn income from work from the age of eighteen through the age of sixty-five, if he had not been injured, in the amount of **fifty percent** of the average weekly wage in the Commonwealth of workers in the private, nonfarm sector. Loss of earnings are not assignable and not generally subject to claims of creditors.

d. Reasonable expenses incurred in connection with the filing of a claim under the Act and this plan, including reasonable attorneys' fees, which shall be subject to the approval and award of the Commission.

6. A copy of the award shall be sent immediately by registered or certified mail to the parties.

G. Review of Commission Determination or Award

1. If a hearing held pursuant to this Article was not held before the fill Commission, a party may apply for the review of any determination of award made. Such application shall be made to the Commission within twenty days from the date of such determination or award and, if such application for review is made, the full Commission, excluding any member who made the determination or award, shall review the evidence.

2. If deemed advisable, the full Commission may instead conduct a rehearing and issue an affirming or amended determination or award, as deemed appropriate.

3. Upon such review or rehearing, a statement of the findings of fact, conclusions of law and other matters pertinent to the questions at issue shall be filed with the record of the proceeding and shall be sent immediately to the parties.

H. Appeal

1. The determination of the Commission concerning the eligibility of a claimant for compensation or with regard to the amount of any such award, if not reviewed within the time prescribed by § 38.2-5010, or upon such review as provided in this Article, shall be conclusive and binding as to all questions of fact. No appeal may be taken from the decision of one commissioner until a review has been had before the full Commission.

2. Appeals shall lie from the full Commission to the Court of Appeals in the manner provided in the Rules of the Supreme Court.

3. A notice of appeal shall be filed with the clerk of the Commission within thirty days of the date of such determination or award or within thirty days after receipt by registered or certified mail of notice of such determination or award, whichever occurs last. A copy of the notice of appeal shall be filed with the clerk of the Court of Appeals, as provided in the Rules of the Supreme Court.

4. Cases appealed shall be placed upon the privileged docket of the Court and be heard at the next ensuing term. In case of an appeal from an award of the Commission to the Court of Appeals, the appeal shall operate as a suspension of the award, and the Program shall not be required to make payment of the award involved in the appeal until the questions at issue shall have been fully determined.

XII. SETTLEMENT ORDERS

A. Settlement Orders Authorized

At any time after the report of the medical evaluation panel has been filed with the Commission concerning a claim against the Fund, the board may enter into an agreed order with the claimant and the claimant's attorney, if any, to be presented to the Commission for approval.

B. Execution of Settlement Order

An agreed order shall be executed by the claimant, the claimant's attorney, if any, and the duly authorized representative of the Program.

C. Commission Approval

The Program, the claimant and the attorney for the claimant, if any, shall jointly petition the Commission to review any agreed order. An agreed order shall be effective only upon the approval of the Commission.

D. Force and Effect of Approved Order

An agreed order approved by the Commission shall have the same force and effect as a Commission determination made pursuant to §§ 38.2-5008 (A) and 38.2-5009.

XIII. MEDICAL EVALUATION OF CLAIMS

A. Review of Medical Evaluation Panel

Each claim filed with the Commission shall be reviewed by a panel of three qualified and impartial physicians according to the plan developed by the deans of the medical schools of the Commonwealth, as required by § 38.2-5008 (B).

B. Cooperation of Claimants, Participating Physicians and Participating Hospitals

Claimants, participating physicians and participating hospitals shall cooperate with the medical evaluation panel in its evaluation of claims. This cooperation shall include, but not be limited to:

1. Access to a claimant's medical records; and

2. The physical examination of the claimant by a panel member or members.

C. Panel Report

A panel shall file its report and recommendations whether the injury alleged is a birth-related neurological injury, as defined in § 38.2-5001, with the Commission at least ten days prior to the date set for a hearing pursuant to § 38.2-5006 and Article XI of this plan.

D. Availability of Report

The report of a panel shall be mailed or delivered to the Program, the claimant and any participating physician and participating hospital named in the petition.

XIV. LEGAL SERVICES

Legal services for the Program shall be provided by the Office of the Attorney General of Virginia, or by other counsel appointed with the approval of the Attorney General of Virginia.

XV. NOTIFICATION REQUIREMENTS

The Program will provide informational brochures to all physicians and hospitals providing obstetrical services in the Commonwealth for distribution to obstetrical patients. The brochure will include a clear and concise explanation of a patient's rights and limitations under the Act.

A medical malpractice insurance company licensed to do business in the Commonwealth of Virginia or any self-insurer shall report to the Program on a form provided by the Program when a claim is made alleging that a possible birth-related neurological injury or a severe adverse outcome related to a birth has occurred. The Program shall inform the parent or parents or guardians of the child of the Program's existence and eligibility requirements upon receipt of the report.

As used in this section, XV, "*Claim*" means that a possible birth-related neurological injury or a severe adverse outcome related to a birth has been reported to a medical malpractice insurance company and is being actively investigated as a potential medical malpractice suit.

XVI. INVESTMENT AND REPORTING REQUIREMENTS

The board shall discharge its duties with respect to the Fund solely in the interest of the beneficiaries thereof and shall invest the assets of the Fund with the care, skill, prudence, and diligence under the

circumstances then prevailing that a prudent person acting in a like capacity and diligence under the circumstances then prevailing familiar with such matters would use in the conduct of an enterprise of alike character and with like aims. Any decisions regarding the investment of the assets of the Fund shall be based on the advice of one or more investment advisors retained by the board from a list provided by the chief investment officer of the Virginia Retirement System. The board shall report annually to the Speaker of the House of Delegates and to the Chairman of the Senate Rules Committee regarding the investment of the Fund's assets.

XVII. AMENDMENT TO THE PLAN

Amendments to this plan may be made by the board subject to the approval of the SCC.

XVIII. EFFECTIVE DATE AND DURATION

This plan shall be effective upon its adoption by the board and its approval by the SCC. The plan shall continue in force and effect until rescinded by the board or abrogated by the General Assembly.

XVIX CONFLICT WITH STATE LAW

If any provision of state law is found to be in conflict with the provisions of this plan, the statute shall control.